



THE DUST SETTLES, PART II

In part two of a two-part article series, we look at industry-related bills.

ON MAY 29, the 2017 legislative session came to a close. As usual, it was a busy session. 6,631 bills were filed. 1,211 bills passed through the legislative process and were sent to Gov. Greg Abbott for signature.

The legislative process is designed to make it very difficult for bills to pass. Bills must go through an intensive committee process and then be passed by both the Texas House of Representatives and the Texas Senate. Finally, the bills are sent to the governor for signature.

In last month's article, we discussed new laws relating to water allocation and submetering charges, a resident's right to summon police or emergency assistance and entry by a former resident or co-resident to retrieve personal property. Let's take a look at some other significant apartment-related bills that passed and either have or will become law.

Evictions

- **Amends Texas Property Code:** Section 24.011 (HB 3879, effective date Sept. 1, 2017)

- **Changes to Law:** The Texas Property Code has been modified to state that in an appeal of an eviction suit for nonpayment of rent, an owner may be represented by the owner's authorized agent, who need not be an attorney, or, if the owner is a corporation or other entity, by an employee, owner, officer, or partner of the entity, who need not be an attorney.

- **Comment:** There has been some confusion with respect to whether the wording of the new law allows an owner entity to be represented by an authorized agent (as opposed to just the owner entity's "employee, owner, officer, or partner"). However, assuming that the new law will be construed to allow an owner entity to be represented by the owner's authorized agent (who may be something other than an employee, owner, officer or partner of the entity), the new law offers an owner the choice in nonpayment of rent cases to present the case to the county court on ap-

peal without having an attorney. This will include being represented by the property manager as the owner's authorized agent.

Property managers are used to going to the justice of the peace court and representing the owner in nonpayment of rent evictions. Owners should be careful before having property managers or other third parties go to the county court without an attorney. Unlike the justice of the peace court, the county court at law is required to follow the rules of evidence and procedure when hearing a case.

If an owner sends a manager or another third party to court without an attorney, and the owner loses, there may be significant hurdles in pursuing a subsequent eviction against the resident or even collecting the past due rent. For example, if an owner seeks recovery of rent for three months and possession in an eviction appeal, but the notice to vacate was not delivered properly, the county court judge could rule against the owner for giving a faulty notice.

The problem occurs with a concept known as "res judicata," which is Latin and translates to "a thing adjudged." Basically, res judicata means that a final judgement on the merits is conclusive between the parties to a suit as to all matters that were litigated or that could have been litigated in that suit. This prevents a dissatisfied party from trying to litigate the issue a second time.

If you lose an eviction because of a notice to vacate, faulty evidence or some other reason unrelated to the payment of rent and you sought recovery of delinquent rent in the suit, a loss may result in your inability to collect the delinquent rent sought. Although a subsequent eviction could be based upon a subsequent nonpayment of rent default, you may have lost

As usual, it was a busy session. 6,631 bills were filed. 1,211 bills passed through the legislative process and were sent to Gov. Greg Abbott for signature. It's interesting to note that in the 2015 legislative session (the previous session), only 6,276 bills were filed, but 1,323 bills passed. In other words, **although 355 more bills were filed this session, 112 less bills were passed.**

the right to collect the delinquent rent that was the subject of the lost suit.

Towing Vehicles: Another Location, Same Parking Lot

- **Amends Texas Occupations Code:** Section 2308.205. (SB 1501, effective date June 15, 2017)

- **Changes to Law:** The law modifies where a vehicle can be towed in conjunction with a nonconsent tow (a tow that is not authorized by the vehicle's owner or operator).

The Texas Towing and Booting Act is modified to state that a towing company that makes a nonconsent tow is required to tow the vehicle to a vehicle storage facility unless: (i) the towing company agrees to take the vehicle to the location designated by the vehicle's owner; or (ii) the vehicle is towed under rules adopted by the Texas Commission of Licensing and Regulation or under a statute pertaining to special events on a university campus.

The new law requires the Commission of Licensing and Regulation to adopt rules authorizing a towing company that makes a nonconsent tow from a parking facility to tow the vehicle to another location on the same parking facility under the direction of the parking facility owner, the parking facility's authorized agent or a peace officer.

- **Comment:** Under the previous law, a towing company was required to make a noncon-

sent tow to a vehicle storage facility. Under the new law, at the direction of the parking facility owner or the owner's agent, the towing company can make a nonconsent tow from one location to another within the same parking facility. This will allow you to have vehicles towed to another location in your parking lot as opposed to a vehicle storage facility. Ideally, this will make it easier and cheaper for residents or others that were towed to pick up their vehicle.

Be careful before setting up a policy of towing vehicles to another location within the same parking lot. If you are going to pursue such a program, among the things to consider are: (i) where vehicles will be towed; (ii) how you will identify vehicles being towed; (iii) how and when the owner of a towed vehicle will be able to pick up the vehicle; and (iv) any liability issues associated with storing a towed vehicle to an area in your parking lot.

Keep in mind that any procedure or rules you set up for towing from one area of your parking to another will need to be in compliance with rules adopted by the Commission of Licensing and Regulation. If you are interested in pursuing this type of policy, stay tuned to the commission's progress on the adoption of rules.

Towing Vehicles: Non-displayed Unexpired License Plate or Registration Insignia

• **Amends Texas Occupations Code:** Sections 2308.253. (SB 1501, applies to contracts entered into on or after June 15, 2017)

• **Changes to Law:** The new law modifies the owner's ability to tow a vehicle that does not display an unexpired license plate or registration insignia. As with the old law, in order to perform such a tow, there needs to be a contract between the owner of the parking facility and the vehicle owner: (i) providing for the towing of a vehicle that does not display an unexpired license plate or registration insignia; and (ii) requiring the owner or operator of the vehicle to be given at least 10 days' written notice that the vehicle will be towed from the facility if the vehicle is not removed.

The change in the law is with respect to the contents of the 10-day notice that must be given. Under the new law, the notice must state:

- (1) that the vehicle does not display an unexpired license plate or registration insignia;
- (2) that the vehicle will be towed at the expense of the owner or operator of the vehicle if the vehicle does not display an unexpired license plate or registration insignia; and

(3) a telephone number that is answered 24 hours a day to enable the owner or operator of the vehicle to locate the vehicle;

The new law also changes how the notice can be delivered. The notice must be: (i) delivered in person to the owner or operator of the vehicle; (ii) sent by certified, return receipt requested, to the owner or operator; or (iii) attached to the vehicle's front windshield, driver's side window, or (if the vehicle has no front windshield or driver's side window) to a conspicuous part of the vehicle.

• **Comment:** The notice requirement has been expanded to require that the telephone number that is answered 24 hours a day be included in the notice. The new law also allows the notice to be attached to the vehicle as an alternative to either delivering the notice or sending the notice by certified mail.

Credit Card Surcharges

• **Amends Texas Finance Code and Texas Business & Commerce Code:** By transferring Section 339.001 of the Texas Finance Code to Chapter 604A of the Texas Business & Commerce Code and redesignating Section 339.001 of the

/ See Law, Page 27

THE ADVENTURES OF ORANGE CONE MAN FROM PAVEMENT SERVICES!
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I NEED TO FIX THESE POTHOLES ON MY PARKING LOT, AND I WANT TO USE THE CONE MAN COMPANY. WHAT'S THEIR PHONE NUMBER?

LOOK, HERE'S A CONE MAN FLYER!

i Kan Ficks Your Paviment Problems
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LATER THAT AFTERNOON...

AAAAAGH!! THIS IS EVEN WORSE THAN BEFORE! WHO ARE YOU? HELP! HELP!

I'M EVIL-ER-GOOD CONE MAN, JUST DOING MY JOB! MWAHAHA!

DANG!

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Law, continued from Page 12

Texas Finance Code to Section 604A.0021 of the Texas Business & Commerce Code (SB 560, effective date Sept. 1, 2017)

• **Changes to Law:** The law pertaining to credit surcharges is modified to take away the exclusive jurisdiction of enforcing the law from the Consumer Credit Commissioner. Section 604A.0021 relating to the imposition of credit card surcharges is now subject to enforcement by the Attorney General. The Office of Consumer Credit Commissioner (OCCC) will not be investigating complaints regarding credit card surcharges as of September 1, 2017.

• **Comment.** We have previously written articles regarding interpretations from the OCCC regarding the imposition of a surcharge for the use of credit cards by residents. As of the effective date of this new law, the attorney general, rather than the OCCC, will be enforcing the law. Whether this will be beneficial to the apartment industry will depend upon the facts of the particular case at hand and interpretations from the attorney general's office.

It also is interesting to note that the credit card surcharge prohibition is currently the subject of both federal and state court cases questioning the enforceability of the prohibition. Keep abreast of future attorney general opinions and court rulings with respect to this issue.

Many of the bills that could have affected our industry died during the session. However, there were some significant changes that can't be ignored. Of course, these new laws are subject to interpretation by the courts and various governmental agencies. Some could also be subject to additional regulation. As always, keep informed of these interpretations and rules. 📞

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